84-29

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Petitioners,

—against—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. If the bistate agreement, known as the Waterfront Commission Act, is a compact within the meaning of the Compact Clause, U.S. Const. art. I, § 10, cl. 3, does its approval by Congress in 1953 transform it into federal law for all purposes, including insulation from pre-emption by the Employee Retirement Income Security Act of 1974?

2. Was the exercise of § 1257(2) appellate jurisdiction by this Court in a related case, which necessarily included a determination that the Waterfront Commission Act is a state statute, a meaningless formality which the lower federal courts were free to disregard?

Parties

The caption of this petition contains the names of all parties to the proceeding below.

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IN THE

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No. .....

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Petitioners,

—against—

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners NYSA-ILA Vacation and Holiday Fund and NYSA-ILA GAI Fund pray that a writ of certiorari issue to review the judgment entered in this case on April 9, 1984 by the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the court of appeals is reported at 732 F.2d 292. A copy is reproduced as Appendix A to this petition (App. A at 1a-13a).[1] The opinion of the district court is unreported. It is reproduced as Appendix B (App. B at 14a-23a).

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[1] References are to the pages of the appendix.

Jurisdiction

The judgment of the court of appeals was entered on April 9, 1984. This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).[2]

Relevant Constitutional and Statutory Provisions

The relevant enactments are: U.S. Const., art. I, § 10, cl. 3; Waterfront Commission Act of New York and New Jersey ("WCA"), N.Y. Laws of 1953, c. 882 and N.J. Laws of 1953, c. 203, pt. 1, art. XIII, par. 3, N.Y. Unconsol. Laws §9858 (McKinney 1974);[3] and, Employee Retirement Income Security Act ("ERISA") §§ 403(c)(1), 574(a) and 574(d), 29 U.S.C. §§ 1103(c)(1), 1144(a) and 1144(d) (1976). The complete texts of these provisions are reproduced verbatim in Appendix C to this petition (App. C at 24a-26a).

Statement of the Case

This case involves the attempt by Respondent Waterfront Commission of New York Harbor ("Commission") to extend the grasp of its statutory assessment to reach employee benefits collectively bargained in response to technological job displacement. (App. B at 16a-17a). The devastating impact of containerization upon longshoremen

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[2] Jurisdiction of the district court was invoked under 28 U.S.C. § 1337; 29 U.S.C. §§ 1132, 1144; and the Supremacy Clause of the Constitution of the United States, art. VI, § 2.

[3] The WCA was approved by an Act of the Congress of the United States. Act of August 12, 1953, Pub. L. No. 83-252, 67 Stat. 541, *reprinted* in 1953 U.S. Code Cong. & Ad. News 605. For ease of reference the relevant WCA provision will be cited in this petition as § 9858, its designation in McKinney's N.Y. Unconsol. Laws.

and the bitter labor relations conflict spanning a quarter century that it engendered are well known to this Court. *See NLRB* v. *International Longshoremen's Association*, 447 U.S. 490 (1980). Management and labor in the Port of New York negotiated an employee benefits program designed to ameloriate the effects of the new technology. This program provided a package of fringe benefits, which included pension and welfare benefits, vacation and holiday ("V&H") benefits, and supplemental unemployment benefits, known as Guaranteed Annual Income ("GAI"). (App. B at 16a-17a).

Eligibility for fringe benefits is structured so as to include the displaced workers whom the benefits are designed to compensate. Recognition that it was automation which gave rise to the fringe benefits program prompted the adoption of a system which placed the funding obligation not upon the longshoremen's direct employers but upon steamship carriers serving the port in proportion to their use of the offending technology. The carriers' contributions are based upon cargo tonnages moving through the port, not upon man-hours of work performed. (App. B at 16a).

A network of ERISA trust funds was established to carry out both the collection and payment phases of the fringe benefits program. Two of these funds are Petitioners NYSA-ILA Vacation and Holiday Fund and NYSA-ILA GAI Fund. These Funds administer and dispense V&H and GAI benefits, respectively.[4] The Funds receive the tonnage contributions from the steamship carriers and directly dispense benefits to the longshoremen and their dependents. (App. B at 17a).

The Commission is financed by a statutory assessment upon "gross payroll payments" made to longshore employees "by employers . . . for work or labor performed."

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[4] Petitioners will be referred to collectively as the "Funds."

See WCA § 9858. The Commission imposed this assessment on GAI and V&H benefits. Virtually from their inception, in 1971, the Funds protested the assessment. (App. A at 5a). In 1978 payment of the Commission's assessment was discontinued, and litigation ensued. (App. A at 5a).

Related Litigation

Various employers commenced an action in state court for a judicial construction that GAI and V&H benefits are not subject to the Commission's assessment because they are not "gross payroll payments made by . . . employer[s] . . . for work or labor performed"—the only items assessable under the Commission's statute. The Commission counterclaimed for a declaratory judgment that the statute, WCA § 9858, authorized the challenged assessment, naming the Funds as counterclaim-defendants.

The Funds answered by denying the Commission's interpretation. Rather than raise their ERISA pre-emption claim in the state action, the Funds exercised their right to present this federal question to a court of the United States by commencing the action which gave rise to this petition. The district court placed the federal action on the suspense calendar pending completion of the state litigation. *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964).

The New York court of first instance had no difficulty interpreting the Commission's taxing statute as written. Based upon the manifest facts that "GAI and V&H benefits are not paid by employers of longshoremen [n]or are they paid for work or labor performed," the court readily concluded that "GAI and V&H benefits are not payments within the wording of the taxing statute under construction." *American Sugar Refining Co.* v. *Waterfront Commission*, No. 11662/78, slip op. at 3 (Sup. Ct. N.Y. Co. Nov.

15, 1979).[5] The five justices on the Appellate Division panel affirmed unanimously without opinion. 79 A.D.2d 892, 435 N.Y.S.2d 868 (N.Y. App. Div. 1980).

The New York Court of Appeals reversed. 55 N.Y.2d 11, 432 N.E.2d 578, 447 N.Y.S.2d 685 (1982). It held that "the labor costs of the industry, however incurred," are assessable and that any "payor of the benefits" is an employer responsible for the assessment. 55 N.Y.2d at 28, 33, 432 N.E.2d at 585, 588, 47 N.Y.S.2d at 692, 695. This Court dismissed an appeal from the decision of the New York Court of Appeals "for want of a substantial federal question." *New York Shipping Association* v. *Waterfront Commission*, 458 U.S. 1101 (1982).

Decisions Below

This federal action was then reactivated. The district court granted summary judgment in the Commission's favor and dismissed the complaint. The district court held that WCA § 9858 is a federal law and, therefore, not preempted by ERISA. The court of appeals affirmed. It viewed this Court's exercise of appellate jurisdiction under 28 U.S.C. § 1257(2) (1976) in the related *American Sugar* litigation as a meaningless formality. (App. A at 13a). It disregarded the fact that § 1257(2) jurisdiction attaches only when the statute upheld by a state court, here WCA § 9858, is a state statute.[6] The court of appeals then independently proceeded to find that the WCA is a compact within the meaning of the Compact Clause, U.S. Const.

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[5] The slip opinion in the state case, which will hereinafter be referred to as *American Sugar*, is reproduced in Appendix D to the jurisdictional statement filed in *New York Shipping Ass'n* v. *Waterfront Comm'n*, 458 U.S. 1101 (1982) (No. 81-2062).

[6] If WCA § 9858 were a federal law, review by this Court would have been available only by certiorari under 28 U.S.C. § 1257(3) (1976).

art. I, § 10, cl. 3, and that congressional consent had transformed it into a federal statute. The court of appeals thus concluded that WCA § 9858 was not pre-empted by ERISA.

REASONS FOR GRANTING THE WRIT

1. *Need For Exercise of This Court's Supervisory Power*

The court of appeals disregarded this Court's binding precedent in the related state litigation. Despite the characterization by the New York Court of Appeals in *American Sugar* that WCA § 9858 is "a Federal law," *see* 55 N.Y.2d at 30, 432 N.E.2d at 587, 447 N.Y.S.2d at 694, this Court did not dismiss the appeal for want of jurisdiction. It asserted appellate jurisdiction but dismissed for want of a substantial federal question. *New York Shipping Association* v. *Waterfront Commission*, 458 U.S. 1101 (1982) (No. 81-2062). This disposition was possible only if WCA § 9858 was a state statute.

Jurisdiction to review state court decisions is prescribed in 28 U.S.C. § 1257 (1976). Appeals from state courts are authorized in only two instances:

(1) When a state court invalidates a federal statute, *see* § 1257(1); and

(2) When a state court declines to invalidate a state statute, *see* § 1257(2).

Since the New York Court of Appeals refused to invalidate WCA § 9858, this Court's assertion of appellate jurisdiction in *American Sugar* necessarily included the determination that WCA § 9858 is a state statute.[7]

[7] This result did not create any internal inconsistency in this Court's determination. Summary dispositions do not constitute adoptions of the reasoning of the courts below. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977). Hence, this Court's refusal to disturb the judgment in *American Sugar* did not amount to an approval of the "Federal law" reasoning of the New York State Court of Appeals. Assertion of § 1257(2) jurisdiction necessarily rejected this reasoning.

This jurisdictional issue was directly raised and litigated by the Commission in *American Sugar*. In its motion to dismiss the § 1257(2) appeal to this Court, the Commission's principal ground for dismissal was its contention that WCA § 9858 "is not a state statute within the meaning of 28 U.S.C. § 1257(2)." *See* Commission's Motion To Dismiss at 2-3, *New York Shipping Association* v. *Waterfront Commission*, 458 U.S. 1101 (1982) (No. 81-2062). If WCA § 9858 were a federal law, as the Commission argued, Supreme Court review would have been available only by certiorari under § 1257(3). Where a litigant mistakenly attempts to invoke the Supreme Court's appellate jurisdiction in a case where it does not lie, the Court is required to cure the defect by converting the improvident appeal into a petition for certiorari. *See* 28 U.S.C. § 2103 (1976).[8] In its prayer for relief to this Court, the Commission seemed to suggest this corrective approach when it urged that "the appeal herein should be dismissed or certiorari should be denied." *See* Commission's Motion To Dismiss at 6, *New York Shipping Association* v. *Waterfront Commission*, 458 U.S. 1101 (1982) (No. 81-2062).

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[8] In this situation, the Court dismisses the appeal for want of jurisdiction and then rules on the propriety of granting certiorari. Cases presented to this Court for review are not treated perfunctorily. A Lexis search (Genfed library, Sup file) of the October 1981 Term revealed the disposition of 174 putative appeals. In 40, the Court accepted review by noting probable jurisdiction. In 78, the Court recognized that its appellate jurisdiction had been properly invoked, but it dismissed for want of a substantial federal question. However, in the remaining 56, the Court declined review saying: "The appeal is dismissed for want of jurisdiction. Treating the pages whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied." The care and attention which the Justices devote to the disposition of applications for review are underscored by the fact that in 2 of the 56 cases in which the Court converted an improvident appeal into a certiorari application the Court was split. *See Davis* v. *Mississippi*, 457 U.S. 1113 (1982) ("Justice White would note probable jurisdiction and set the case for oral argument"); *Ben-Levi* v. *Ben-Levi*, 454 U.S. 957 (1981) ("Justice Blackman would note probable jurisdiction and set the case for oral argument"). If this Court had considered the WCA to be a federal law, it would have disposed of the appeal in *American Sugar* along with the 56 cases in which it found it had no appellate jurisdiction.

This Court, however, treated the jurisdictional statement in *American Sugar* as a properly lodged appeal under § 1257(2). It refused the Commission's suggestion to dismiss the appeal on jurisdictional grounds and deny the application as a petition for certiorari. Instead, the Court asserted its obligatory appellate jurisdiction. This exercise of jurisdiction constituted a decision binding upon the court of appeals in this case that WCA § 9858 is a state statute.[9]

The court of appeals brushed aside this Court's summary dismissal in *American Sugar*. It found no jurisdictional significance in the assertion of appellate jurisdiction but treated the summary dismissal merely as a shorthand rejection of the importance of the case for plenary review. In the view of the court of appeals, the manner in which this Court disposes of cases is incidental. Language is employed indiscriminately. Orders of disposition are meaningless except for the bottom line acceptance or rejection of review.

The cavalier attitude displayed by the court of appeals in this case flies in the face of well-established precedent.

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[9] This conclusion is consistent with every case in which this Court had previously reviewed the very same compact in a pre-emption setting. *See DeVeau* v. *Braisted*, 363 U.S. 144, 146 (1960) ("[s]ince a statute of a State has been upheld by the highest court of the State against a federal constitutional attack, the case is properly here on appeal"); *cf. Linehan* v. *Waterfront Comm'n*, 347 U.S. 439 (1954). Indeed, the many decisions spanning the thirty-year life of the WCA have consistently treated it as a state statute for pre-emption purposes. *See, Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 642 F.2d 666 (2d Cir. 1981), *rev'g on other grounds*, 495 F. Supp. 1101 (S.D.N.Y. 1980), *cert. denied*, 454 U.S. 966 (1981); *Bell* v. *Waterfront Comm'n*, 279 F.2d 853 (2d Cir. 1960); *Int'l Longshoremen's Ass'n* v. *Waterfront Comm'n*, 85 N.J. 606, 428 A.2d 1283 (1981); *New York Shipping Ass'n* v. *Waterfront Comm'n*, No. 78-1659 (D.N.J.), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *Linehan* v. *Waterfront Comm'n*, 116 F. Supp. 401 (S.D. N.Y. 1953), *aff'd* 347 U.S. 439 (1954); *cf. Ciccone* v. *Waterfront Comm'n*, 438 F. Supp. 55 (S.D.N.Y. 1977).

Supreme Court summary affirmances and dismissals for want of a substantial federal question are judgments on the merits with respect to the "precise issues presented and necessarily decided" in disposing of an appeal. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (*per curiam*). *See also Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-83 (1979); *Washington* v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 477-78 n.20 (1979); *Hicks* v. *Miranda*, 422 U.S. 332 (1975). Although summary dispositions carry less precedential weight than do decisions rendered with opinion, *see, e.g., Washington, supra*, 439 U.S. at 476-77 n.20; *Edelman* v. *Jordan*, 415 U.S. 651, 670-71 (1974), they are still binding upon the lower courts since "the privilege of disregarding even summary Supreme Court holdings rests with that court alone." *Doe* v. *Hodgson*, 500 F.2d 1206, 1207-08 (2d Cir. 1974); *see also Delta Air Lines, Inc.* v. *Kramarsky*, 650 F.2d 1287, 1295 (2d Cir.), *modified on other grounds*, 666 F.2d 21 (2d Cir. 1981), *modified on other grounds sub nom. Shaw* v. *Delta Air Lines, Inc.*, —— U.S. ——, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983).

The need for this Court's intervention in this case transcends merely the correction of the error of the court of appeals. Summary dispositions by this Court are an integral part of the federal judicial system. They occur hundreds of times each term. Considerable care and attention are devoted to their rendition. If the attitude of the court of appeals is left uncorrected, these summary dispositions become the meaningless exercises the court of appeals thought they are. A little of the Court's time in this case would be well invested to protect the substantial time and effort it regularly expends in discharging its jurisdictional duties.[10]

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[10] Exercise of this Court's supervisory power would not require plenary review in this case. All that need be done is summary vacatur with instructions to reconsider in light of the disposition in *American Sugar*.

2. *Important Issue of Constitutional Dimension*

This case calls into question the scope and effect of the Compact Clause. Although the federal coloration of interstate compacts has been given some recognition,[11] this Court has never expressly accorded them the status of federal statutes. Indeed, they have been considered state law for the purpose of finding the requisite color of state law to permit redress under 42 U.S.C. § 1983 (1976). *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency,* 440 U.S. 391, 399 (1979). The court of appeals in this case, however, ruled that an interstate compact, once it receives congressional sanction, is automatically transformed into a federal statute for all purposes and thus immunized from a preemption challenge. This expansion of the federal status of an interstate compact raises a serious question unanswered in previous decisions of this court. The proliferation of compacts underscores the national importance of this question. Of the 176 compacts adopted since the inception of the Union, 140 have come into being within the last sixty years. *Compare* 23 COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 601 note (1980) *with* W. BARTON, INTERSTATE COMPACTS IN THE POLITICAL PROCESS 3 (1967).

The status of compacts within the federal statutory scheme must be expressly defined. In this case, the decision of the court of appeals had the effect of thwarting the congressional policy confining employee benefits to federal regulation under ERISA. The clear intent of Congress enacted in 1974 to remove employee benefits from

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[11] Construction of approved compacts presents a federal question triggering the jurisdiction of federal courts. *Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959). Compacts involve federal rights enabling this Court to exercise its certiorari jurisdiction. *Delaware River Joint Tollbridge Comm'n* v. *Colburn,* 310 U.S. 419 (1940). State court interpretations of compacts do not preclude later independent constructions by the federal judiciary. *Cuyler* v. *Adams,* 449 U.S. 433 (1981).

the reach of "any and all State laws," 29 U.S.C. § 1144(a) (1976), was required to yield to an approval given by Congress twenty years before in an entirely different context. The congressional approval of the interstate arrangement embodied in the WCA could not have envisioned that in subsequent years fringe benefit funds would be established, that Congress would single them out for federal protection under ERISA, and that a state court would find that they were subject to the taxing power of the Commission to defray costs which would otherwise be borne by state treasuries.

If the decision of the court of appeals in this case is allowed to stand, it would mean that every compact approved by Congress would escape the pre-emptive will of subsequent enactments. Congress would be required whenever it intended to exercise its power of pre-emption to review the more than 100 compacts it has approved during its history to see to it that they are appropriately modified or repealed if they conflict with the contemporary legislative design. Conversely, any new compact presented for consent must be carefully scrutinized not merely with respect to its apparent subject matter and purposes but also to be sure it is in harmony with other federal statutes since congressional consent will elevate it to the level of a federal statute for all purposes.

This case then has unique importance. Congress is entitled to know what far-reaching effects its seemingly innocuous consent to an interstate compact may have. Only a clear-cut instruction from this Court will suffice.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
July 3, 1984

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 631—August Term, 1983

(Argued January 25, 1984 Decided April 9, 1984)

Docket No. 83-7715

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Plaintiffs-Appellants,

—v.—

THE WATERFRONT COMMISSION OF
NEW YORK HARBOR,

Defendant-Appellee.

Before:

MANSFIELD, PIERCE and WINTER,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge,* denying appellants' motion for partial summary judgment, granting appellee's motion for partial summary judgment, and dismissing appellants' complaint which sought a declaratory judgment that the assessment procedure utilized by the appellee is preempted by the Employee Retirement Income Security Act.

Affirmed.

ERNEST L. MATHEWS, JR., New York, New York (Thomas W. Gleason, New York, New York, of counsel), *for Plaintiffs-Appellants.*

IRVING MALCHMAN, New York, New York (Gerald P. Lally, General Counsel, David B. Greenfield, Assistant Counsel, New York, New York, of counsel), *for Defendant-Appellee.*

PIERCE, *Circuit Judge:*

Appellants NYSA-ILA Vacation and Holiday Fund ("Vacation Fund") and NYSA-ILA GAI Fund ("GAI Fund") (hereinafter alternatively referred to collectively as the "Funds")[1] appeal from a judgment, entered July 22, 1983, in the United States District Court for the Southern District of New York, Thomas P. Griesa, *Judge,* denying the Funds' motion for partial summary judgment, granting the motion for partial summary judgment of appellee The Waterfront Commission of New York Harbor ("Waterfront Commission" or "Commission"), and dismissing the Funds' action which sought, *inter alia,* a declaratory judgment that the Commission's assessment procedure is preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

For the reasons set forth below, we affirm.

I. BACKGROUND

The Waterfront Commission was established in 1953 by the Waterfront Commission Compact ("Compact"), an interstate compact between New York and New Jersey. The Compact was enacted by the legislatures of the two states,[2]

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[1] The abbreviations refer to the following:

NYSA—New York Shipping Association
ILA —International Longshoremen's Association
GAI —Guaranteed Annual Income

[2] 1953 N.Y. Laws cc. 882, 883; 1953 N.J. Laws cc. 202, 203. The Compact is codified in N.Y. Unconsol. Laws §§ 9801-9873 (McKinney 1974), and constitutes Part I of Title 29 of McKinney's Unconsolidated Laws. Parts II and III of Title 29 contain imple-

(footnote continued on following page)

and was approved by the United States Congress. Act of Aug. 12, 1953, Pub. L. No. 83-252, 67 Stat. 541, *reprinted in* 1953 U.S. Code Cong. & Ad. News 605. The Compact constitutes Part I of the Waterfront Commission Act ("Act"), which formulates a scheme for governmental supervision of employment on the waterfront in the Port of New York, and which was intended to cope with problems of long-standing on New York and New Jersey's joint waterfront in that Port. *See De Veau* v. *Braisted*, 363 U.S. 144 (1960).

The Compact provides that the Commission's expenses, to the extent not covered by federal grants, are to be financed by statutory assessments paid to the Commission by employers[3] of longshore employees. N.Y. Unconsol.

(footnote continued from previous page)

menting provisions not part of the Compact approved by Congress. The three parts together make up the Waterfront Commission Act ("Act"), N.Y. Unconsol. Laws §§ 9801 *et seq.* (McKinney 1974). In this opinion, the provisions of the Act will be cited to the sections of McKinney's Unconsolidated Laws.

[3] Although initially the term "employer" in the Compact was intended to refer only to stevedoring companies, this is no longer the case. As a result of the advent of container-shipping in the late 1950's, which reduced job opportunities and displaced longshoremen, labor and management in the Port of New York negotiated an employee fringe benefit program designed to ameliorate the effects of the new technology. The program provided a package of fringe benefits, including vacation and holiday benefits and supplemental employment (*sic*) benefits known as Guaranteed Annual Income ("GAI"). At the same time, a system was adopted through which contributions for the longshoremen's fringe benefits were made by shipping companies in order to supplement the contributions made by the stevedoring companies. This was done in recognition of the fact that since the shipping companies were the beneficiaries of containerization, they should assist in financing the longshoremen's fringe benefits.

Payments by the shipping companies were calculated on the basis of container cargo tonnage brought into the port. Over the years, it has developed that the shipping companies provide the great bulk of the payments for vacation, holiday and GAI benefits. Indeed, presently the shipping companies contribute about 97%

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Laws § 9858 (McKinney 1974) ("§ 9858").[4] The amount of the assessment is "computed upon the gross payroll payments" made to such employees. Since its inception, the Commission has taken the position that "gross payroll payments" within the meaning of § 9858 include both regular wages and fringe benefits paid to employees. Since 1953 and thereafter, vacation and holiday benefits have been a standard form of fringe benefit, and the Commission included those benefits in calculating employer asessments. Similarly, when GAI benefits began in 1966, those payments were also included by the Commission in computing assessments.

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of the benefits, with contributions from stevedoring companies amounting to roughly 3%. *See American Sugar Ref. Co.* v. *Waterfront Comm'n,* 55 N.Y.2d 11, 23, 432 N.E.2d 578, 583, 447 N.Y.S.2d 685, 690, *appeal dismissed sub nom. New York Shipping Ass'n* v. *Waterfront Comm'n,* 458 U.S. 1101 (1982).

[4] Section 9858 was part of the Compact as approved by Congress, Art. XIII, par. 3, and it provides:

> After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact. Each such employer shall pay to the commission an assessment computed upon the gross payroll payments made by such employer to longshoremen, pier superintendents, hiring agents and port watchmen for work or labor performed within the port of New York district, at a rate, not in excess of two per cent, computed by the commission in the following manner: the commission shall annually estimate the gross payroll payments to be made by employers subject to assessment and shall compute a rate thereon which will yield revenues sufficient to finance the commission's budget for each year. Such budget may include a reasonable amount for a reserve but such amount shall not exceed ten per cent of the total of all other items of expenditure contained therein. Such reserve shall be used for the stabilization of annual assessments, the payment of operating deficits and for the repayment of advances made by the two states.

(footnote omitted).

In 1971, the appellant Funds were created as a result of a collective bargaining agreement between the ILA, the union, and the NYSA, which is a membership corporation whose members consist of steamship operators, stevedores, terminal operators and other firms performing related services for the shipping industry.[5] In addition to the two appellant Funds, the collective bargaining agreement established a third fund—the NYSA-ILA Fringe Benefit Escrow Fund ("Escrow Fund"). The three funds work in concert as follows: shipping and stevedoring companies deposit their respective share of fringe benefit payments into the Escrow Fund, which in turn makes payments to appellants Vacation Fund and GAI Fund as required by the needs of the latter two funds; then, the appellant Funds directly dispense fringe benefits to the longshoremen and their dependents.

From January 1, 1973 until March 31, 1975, the Commission's assessments on vacation, holiday and GAI benefits were paid, under protest, by the Vacation Fund and the GAI Fund, respectively.[6] Thereafter, pursuant to a resolution proposed by the Commission and adopted by NYSA in 1975, NYSA paid the assessments on these benefits under protest through 1977 when the payments were discontinued and litigation ensued.[7]

In April, 1978, several employers of longshoremen in the Port of New York commenced an action in the Supreme

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[5] NYSA acts as a multi-employer bargaining association that negotiates and administers collective bargaining agreements on behalf of its members with labor organizations.

[6] Prior to December 31, 1972, payment of the Commission's assessments were made, under protest, through NYSA's Central Records Bureau. Funds for the payment were obtained by NYSA assessment against its members.

[7] The Commission is currently seeking the payment of retroactive assessments on GAI and vacation and holiday benefits in the courts of New York State. These state proceedings have no bearing on the case before us.

Court, New York County, challenging the Commission's assessment on vacation, holiday and GAI benefits. Specifically, the employers sought a judgment declaring (1) that vacation, holiday and GAI benefits are not "gross payroll payments" paid by "employer[s] . . . for work or labor performed" within the meaning of § 9858 of the Compact and, therefore, are not subject to assessment by the Commission; and (2) that the Commission's assessment on those benefit payments is unconstitutional upon the ground of federal preemption. The Commission answered the complaint, filed a counterclaim against the employers and, in addition, brought NYSA and the Funds into the state action as counterclaim defendants. In its counterclaim, the Commission sought a judgment that the benefit payments are "gross payroll payments" within the meaning of § 9858 and that the plaintiffs are employers under that section, or, alternatively, that the Funds are, or that NYSA is, an employer under § 9858.

Meanwhile, prior to the disposition of the state action by the New York Supreme Court, the Funds, on January 5, 1979, initiated the federal action which forms the basis of this appeal, alleging that assessments on the benefits paid by the Funds are preempted by ERISA. This ERISA preemption claim was not raised by any of the parties in the state action. In a four-count complaint filed in the District Court for the Southern District of New York, the Funds sought a judgment declaring that ERISA preempted the assessments, a permanent injunction against the Commission and refunds of payments previously made by the Funds to the Commission. During a pre-trial conference, the parties to the federal action agreed that it should be placed on the suspense calendar pending the outcome of the state proceedings.

In an opinion dated February 11, 1982, the New York Court of Appeals rendered a decision in the state action in favor of the Commission. *American Sugar Refining Co.*

v. *Waterfront Commission,* 55 N.Y.2d 11, 432 N.E.2d 578, 447 N.Y.S.2d 685, *appeal dismissed sub nom. New York Shipping Association* v. *Waterfront Commission,* 458 U.S. 1101 (1982). The Court of Appeals held that the vacation, holiday and GAI benefits are included in "gross payroll payments" within the meaning of § 9858 and are therefore assessable by the Commission. The court also held that the Funds, as well as the plaintiff-employers, are liable for assessment on those benefit payments. Finally, the Court of Appeals rejected plaintiffs' contention that the assessment is preempted by federal labor laws governing the collective bargaining process and by federal tax laws. The United States Supreme Court dismissed an appeal from that decision "for want of a substantial federal question."

On March 12, 1982, the federal action was removed from the suspense calendar. Thereafter, the Funds moved for summary judgment on the declaratory judgment count (Count I) of their complaint. The Commission cross-moved for summary judgment on Counts I and II of the complaint—the declaratory judgment and permanent injunction counts. In an opinion dated July 20, 1983, the district court held that the Compact, including § 9858, is a federal law and, therefore, is not preempted by ERISA. Accordingly, Judge Griesa denied the Funds' motion for summary judgment, granted the Commission's cross-motion for summary judgment, and dismissed the entire action. This appeal followed.

II. Discussion

Section 514(a), 29 U.S.C. § 1144(a), of ERISA provides that "all State laws insofar as they may now or hereafter relate to any employee benefit plan" are superseded by ERISA. ERISA section 514(d), on the other hand, specifically states that the provisions of ERISA do not preempt

any federal statutes.[8] Thus, to determine whether the assessment procedure of § 9858 is preempted by ERISA, we must decide whether the Compact, which includes § 9858, should be viewed as a federal or as a state statute. Judge Griesa, relying on the ratification of the Compact by the United States Congress, concluded that it should be viewed as a federal law and thus found not to be preempted or superseded by ERISA. We agree with that conclusion.

The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . ." The Supreme Court, in *Cuyler* v. *Adams,* 449 U.S. 433, 438 (1981), recently reaffirmed the rule that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States".[9] Therefore, our inquiry is

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[8] Section 514(d), 29 U.S.C. § 1144(d), provides:

> (d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.

[9] The rule that congressional consent transforms an interstate compact within the Compact Clause into a law of the United States was well-established at the time *Cuyler* was decided. In 1940 the Supreme Court in *Delaware River Joint Toll Bridge Comm'n* v. *Colburn,* 310 U.S. 419 (1940), stated:

> In *People* v. *Central Railroad,* 12 Wall. 455, jurisdiction of this Court to review a judgment of a state court construing a compact between states was denied on the ground that the Compact was not a statute of the United States and that the construction of the Act of Congress giving consent was in no way drawn in question, nor was any right set up under it. This decision has long been doubted . . . and we now conclude that the construction of such a compact sanctioned by Congress by virtue of Article I, § 10, Clause 3 of the Constitution, involves a federal "title, right, privilege or immunity" . . . .

Id. at 427. (citation omitted). "This holding reaffirmed the law-of-the-Union doctrine and the underlying principle that congres-

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limited to whether the Waterfront Commission Compact is a congressionally sanctioned interstate compact within Art. I, § 10, cl. 3 of the Constitution. *Cuyler* provides guidance for our determination herein. In *Cuyler,* a Pennsylvania state court had interpreted an Interstate Agreement on Detainers, an interstate compact consented to by Congress, as providing no right to a pretransfer hearing. Thereafter, in a federal action involving the same Detainer Agreement, the Court of Appeals for the Third Circuit, while not reaching the constitutional issue, held that it was not bound by the state court's interpretation because the

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sional consent can transform interstate compacts into federal law." *Cuyler,* 449 U.S. at 439 n.7. *See Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 278 (1959) ("The construction of a compact sanctioned by Congress under Art. I, § 10, cl. 3, of the Constitution presents a federal question."); *see also Washington Metropolitan Area Transit Auth.* v. *One Parcel of Land,* 706 F.2d 1312, 1318 (4th Cir.) (where two-part test of *Cuyler* is satisfied, interstate compact becomes federal law when consented to by Congress), *cert. denied,* 104 S. Ct. 238 (1983).

Lake County Estates, Inc. v. *Tahoe Regional Planning Agency,* 440 U.S. 391 (1979), relied upon by appellant Funds herein, does not contradict *Delaware River* or *Cuyler.* In *Lake Country Estates,* the Court held only that the actions of a bi-state agency and its state officials, acting under an interstate compact approved by Congress, were "under color of state law" within the meaning of 42 U.S.C. § 1983. The Court reached this conclusion because:

> The actual implementation of [the bi-state agency], after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the counties. In discharging their duties as officials of [the agency], the state and county appointees necessarily have also served the interests of the political units that appointed them. The federal involvement, by contrast, is limited to the appointment of one nonvoting member to the governing board. While congressional consent to the original Compact was required, the States may confer additional powers and duties on [the agency] without further congressional action.

Id. at 399. (footnotes omitted).

Agreement was an interstate compact approved by Congress and thus was a federal law subject to federal rather than state construction. The Supreme Court in *Cuyler* was called upon to decide whether federal courts were bound by the Pennsylvania court's interpretation because that court had interpreted state law, or whether the federal courts could fashion their own interpretation of the Agreement because congressional consent had transformed it into federal law. The Supreme Court agreed with the Third Circuit and held that an interstate compact or agreement becomes federal law if it is a congressionally sanctioned interstate compact within the meaning of the Compact Clause of the Constitution. According to the Court, although not all interstate agreements are within the scope of the Compact Clause, "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Id.* at 440 (footnote omitted). In applying this test to the interstate agreement in that case, the *Cuyler* court concluded that the agreement was a law of the United States because Congress had given its consent to the Detainer Agreement in advance by enacting the Crime Control Act of 1934, and because the subject matter of the interstate agreement was an appropriate subject for congressional legislation under both the Commerce and the Extradition Clauses of the United States Constitution.

Application of the *Cuyler* criteria to the instant case persuades us that the Waterfront Commission Compact should be viewed as federal law.[10] First, Congress clearly

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[10] This view is consistent with that of the New York Court of Appeals. *American Sugar Ref. Co.* v. *Waterfront Comm'n*, 55 N.Y.2d 11, 25-26, 432 N.E.2d 578, 584, 447 N.Y.S.2d 685, 691,

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enacted a law consenting to the Compact, including § 9858. Act of Aug. 12, 1953, Pub. L. No. 83-252, 67 Stat. 541, *reprinted in* 1953 U.S. Code Cong. & Ad. News 605; *see* H.R. Rep. No. 998, 83d Cong., 1st Sess. 1 (1953) ("The purpose of the bill is to grant congressional consent, pursuant to the Federal Constitution, to an interstate compact between the States of New York and New Jersey setting up a bi-State agency to improve waterfront labor conditions in the port of New York area."); S. Rep. No. 583, 83d Cong., 1st Sess. 2 (1953) (same). Further, it is beyond dispute that Congress' recognized interest in regulating interstate and foreign commerce renders the subject matter of the Compact an appropriate subject for congressional legislation.[11]

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appeal dismissed sub nom. New York Shipping Ass'n v. *Waterfront Comm'n,* 458 U.S. 1101 (1982); *In re Bell* v. *Waterfront Comm'n,* 20 N.Y.2d 54, 61, 63 n.4, 228 N.E.2d 758, 763, 764 n.4, 281 N.Y.S.2d 753, 760, 761 n.4 (1967).

[11] Congressional power to legislate in this area is derived from the Commerce Clause, Art. I, § 8, cl. 3, of the United States Constitution. *Cf. Petty Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275, 281 (1959) (congressional consent given to compact affecting navigable waters and interstate commerce).

The House and Senate Reports accompanying the Act of Aug. 12, 1953, demonstrate Congress' awareness that the problems existing at the Port of New York were of national significance, and also evince Congress' recognition that it had the authority to legislate in this area. In a report endorsing the solution to corruption embodied in the Compact, the Subcommittee of the Senate Committee on Interstate and Foreign Commerce stated: "[T]he Federal Government's concern with [the New York area waterfront] has been intensified by a substantial increase in the flow of military and strategic materials to Europe and Africa through its shipping facilities." S. Rep. No. 653, 83d Cong., 1st Sess. 5 (1953). The Report also noted that the corruption in the New York Port area is affecting "large segments of our maritime industries," and that "[t]he entire Nation has a stake in safeguarding this port and its facilities. *Id.* at 6. *See also* H.R. Rep. No. 998, at 1-2 ("[T]he plan proposed by the States of New York and New Jersey

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Because the Compact, including § 9858, was specifically authorized by Congress, and because the subject matter of the Compact is an appropriate subject for congressional legislation, we hold that the consent of Congress transformed the Compact into federal law under the Compact Clause. Therefore, we conclude that under 29 U.S.C. § 1144(d), the assessment procedure of § 9858 is not preempted by ERISA.

As a final matter, we address the Funds' argument that the United States Supreme Court has already decided that § 9858 of the Compact should be viewed as a state law. That argument proceeds as follows: In *American Sugar Refining Co.* v. *Waterfront Commission,* 55 N.Y.2d 11, 432 N.E.2d 578, 447 N.Y.S.2d 685 (1982), the New York Court of Appeals, in holding that the Commission was authorized to make assessments against vacation and holiday benefits and GAI benefits, characterized § 9858 of the Compact as federal law. The Funds and NYSA appealed that decision to the Supreme Court pursuant to 28 U.S.C. § 1257(2), which authorizes appeal to the Supreme Court when a state court declines to invalidate a state statute in the face of a charge that such statute is repugnant to the Constitution, treaties or laws of the United States. The Supreme Court dismissed the appeal "for want of a substantial federal question." *New York Shipping Association* v. *Waterfront Commission,* 458 U.S. 1101 (1982). The Court's assertion of appellate jurisdiction, the Funds argue, necessarily included the determination that § 9858 is a state law. According to the Funds, if § 9858 is a federal law, Supreme

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to eradicate those public evils is urgently needed . . . . [V]ital public installations, handling military traffic and other Government shipments under the foreign-aid program, have been seriously disrupted."); S. Rep. No. 583, at 1 ("New York is the Nation's largest port; it also is one of the finest natural harbors in the world, and the chief avenue of commerce with our friends and allies across the Atlantic.").

Court review would have been available only by certiorari under 28 U.S.C. § 1257(3), in which case the Court, under 28 U.S.C. § 2103, would have dismissed the appeal for want of jurisdiction and then ruled on the propriety of granting certiorari.

Although the Supreme Court's dismissal of the appeal "for want of a substantial federal question" might, as the Funds argue, be construed as an assumption that the Compact is a state rather than a federal law, we believe that the Court really meant that the issue presented, regardless of the basis of its jurisdiction, was not sufficiently important to warrant review. In our view, the appellants read too much into the Court's failure to treat the appeal as improvidently taken and to convert it into a petition for a writ of certiorari before acting. Accepting the Funds' argument would require considerable speculation by this court to conclude that the Supreme Court intended *sub silentio* and by summary disposition to overrule a well-established rule[12] most recently reaffirmed in *Cuyler*. We find such a conclusion unjustified.

We have considered the Funds' other arguments in this appeal and we conclude that they are without merit.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

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[12] See *supra* note 7 (*sic*).

APPENDIX B

Opinion of United States District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

79 Civ. 0088

NYSA-ILA VACATION AND HOLIDAY FUND and NYSA-ILA GAI FUND,

Plaintiffs,

v.

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Defendant.

GRIESA, *J.*

This is an action by two longshoremen's benefit funds challenging a procedure by which those funds are assessed to pay a portion of the expenses of defendant Waterfront Commission of New York Harbor. The specific claim is that the assessment procedure is barred by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

Plaintiffs move for partial summary judgment—*i.e.*, on their claim for declaratory relief. Defendant moves for summary judgment dismissing the entire action. Plaintiffs' motion is denied. Defendant's motion is granted and the action is dismissed.

Facts

The essential facts are not in dispute. The plaintiff funds are established under § 302 of the Labor-Manage-

ment Relations Act, 29 U.S.C. § 186, and their administration is in certain respects governed by ERISA. The funds administer two longshoremen benefit programs existing under collective bargaining agreements between the International Longshoremen's Association ("ILA") and the New York Shipping Association ("NYSA"). The NYSA is an organization whose members are shipping companies and stevedoring companies.

The Waterfront Commission of New York Harbor is an agency established in 1953 pursuant to an interstate Compact between New York and New Jersey. The Compact was enacted by the legislatures of each state (1953 N.Y. Laws ch. 882; 1953 N.J. Laws ch. 202), and was approved by Congress. Act of Aug. 12, 1953, ch. 407, 67 Stat. 541 (1953). The Compact is contained in part I of title 29 of McKinney's *Unconsolidated Laws* (Book 65). The background of the Compact is discussed in *DeVeau* v. *Braisted*, 363 U.S. 144 (1960), which upheld certain implementing legislation of the Compact against a challenge that such legislation was contrary to federal statutes.

The provision of the Compact at issue in the present case is § 9858 (referring to the McKinney's number). It provides for an assessment to pay part of the expenses of the Waterfront Commission. The provision is:

> "After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact. Each such employer shall pay to the commission an assessment computed upon the gross payroll payments made by such employer to longshoremen, pier superintendents, hiring agents and port watchmen for work or labor performed within the port of New York district, at a rate, not in excess of two per cent, computed by the

> commission in the following manner: the commission shall annually estimate the gross payroll payments to be made by employers subject to assessment and shall compute a rate thereon which will yield revenues sufficient to finance the commission's budget for each year."

The "persons registered or licensed under this compact" are longshoremen. The "employers subject to assessment" were originally intended to be stevedoring companies. However, this has changed in a manner which has given rise to the problem presented in the present case, as will now be described.

When the Waterfront Commission commenced operation it promptly took the position that the "gross payroll payments" within the meaning of § 9858 included both regular wages and fringe benefits paid by stevedoring companies to longshoremen. At this time vacation and holiday benefits were a standard form of fringe benefit. The Waterfront Commission made assessments against the vacation and holiday benefit payments.

With the advent of containershipping in the mid-1960's, an agreement was worked out to provide a Guaranteed Annual Income ("GAI") to longshoremen. At the same time it was agreed to have contributions to the longshoremen's benefit funds made by shipping companies in order to supplement the contributions made by the stevedoring companies. The shipping company payments were made on the basis of container cargo tonnage brought into the port. The theory apparently was that the shipping companies were beneficiaries of containerization and should assist in financing the longshoremen's benefits.

Over the years, it has developed that the shipping companies provide the great bulk of the payments for vacation and holiday and GAI benefits. This has resulted from the drastic reduction in traditional shipping operations in

New York harbor and the decline of the stevedoring industry here. At the present the shipping companies contribute about 97% of the benefits, with the contribution from stevedoring companies being only 3%.

In 1971 the two plaintiff trust funds were established—*i.e.*, the NYSA-ILA Vacation and Holiday Fund and the NYSA-ILA GAI Fund. At the same time an entity called the NYSA-ILA Fringe Benefit Escrow Fund was established. After the creation of these three funds, the basic procedure was to have the stevedoring and shipping companies make benefit payments into the Escrow Fund, which would make payments into the Vacation and Holiday Fund and GAI Fund as required by the needs of the two latter funds.

Turning now to the matter of the Waterfront Commission assessment, as already noted, it has been the theory of the Commission from the outset that it is entitled to make an assessment, under § 9858, of a percentage of both wages *and fringe benefits* paid to longshoremen. The percentage assessed has been 2%. Various mechanisms have been used to make this assessment, which need not be fully described here. The position now taken by the Waterfront Commission is that it is entitled to make its assessment upon the plaintiff funds—the Vacation and Holiday Fund and the GAI Fund—and that these funds are to be deemed "employers" within the meaning of § 9858. The theory behind this is that the traditional "employers," the stevedoring companies, no longer pay more than a small percentage of the fringe benefits. The bulk of the fringe benefits—at least of the vacation and holiday and GAI benefits—are paid by shipping companies and pass through the Vacation and Holiday and GAI Funds. Consequently, for practical reasons the Waterfront Commission seeks to tap substitute sources of fringe benefits by assessing the plaintiff trust funds.

Appendix B—Opinion of United States District Court

On April 26, 1978, 30 members of NYSA filed an action in Supreme Court, New York County, attacking the Waterfront Commission assessment. The plaintiffs in that action included certain shipping companies who did their own stevedoring as well as companies supplying stevedoring and related services. The plaintiffs claimed that the assessment by the Commission on vacation and holiday benefits and GAI benefits was not authorized by § 9858 and was also unconstitutional. The Commission filed a counterclaim, and brought into the state court action the NYSA and the Funds which are the plaintiffs in the present action. The Commission sought a declaratory judgment to the effect that it was entitled to make an assessment against the benefits, and was entitled to collect from the companies, or alternatively from the NYSA, or alternatively from the Funds.

On January 5, 1979 the Funds commenced this federal court action. The complaint is based on a single theory—that collection of the Waterfront Commission assessment from the Funds is barred by ERISA. The ERISA point was not raised in the state court action by any party there. It was agreed by the parties in the federal court action that the state court action should proceed first. Consequently, on May 22, 1979 the federal action was placed on the court's suspense docket.

On February 11, 1982 the New York Court of Appeals handed down its decision in the state court case. *American Sugar Refining Co.* v. *Waterfront Commission of New York Harbor*, 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982). The Court of Appeals held that vacation and holiday benefits and GAI benefits are included in "gross payroll payments" within the meaning of § 9858, and that it was proper for the Commission to make assessments against such benefits. The court rejected the argument of unconstitutionality. The court held that benefits payments made by shipping companies on the basis of tonnage assessments were sub-

ject to the Waterfront Commission assessment. The court held that both the employers of longshoremen and the Funds are liable for the Waterfront Commission assessment. Indeed, the court stated that the Funds should be considered "employers" within the meaning of § 9858.

In the argument before the state courts there was an issue raised in a rather imprecise manner to the effect that the Waterfront Commission procedure was in conflict with federal law. However, it was specifically noted that the argument about the Waterfront Commission being barred by ERISA was being raised solely in the federal court action, not in the state court action.

On April 20, 1982 the federal action was taken off the suspense docket. On June 28, 1982 the United States Supreme Court dismissed an appeal of the state court action for want of a substantial federal question.

Subsequently, the parties to the federal court action made the motions for summary judgment which are the subject of this opinion.

Issues on Motions

Plaintiff Funds argue that § 514(a) of ERISA, 29 U.S.C. § 1144(a), preempts and supersedes § 9858. Section 514(a) provides: "[T]he provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." The Funds contend that the Waterfront Commission assessment constitutes a tax upon an employee benefit fund which is impermissible under ERISA. In addition, the Funds contend that the Commission assessment conflicts with two ERISA provisions—§ 403(c)(1) prohibiting the use of plan assets for an employer's benefit and § 406(a)(1)(D) preventing a plan fiduciary from engaging in a transaction for the benefit of a "party in interest," including employers.

The Commission contends that the Compact, including § 9858, is federal law and is thus not preempted or superseded by ERISA, which specifically provides that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States. . . ." 29 U.S.C. § 1144(d). The Commission argues that, even if the Compact is state law, the assessment procedure is not barred by ERISA. The Commission argues further that the judgment in the state court action is res-judicata on the ERISA point, because that point should have been raised in the state court proceedings even though it was not raised.

Both the Funds and the Commission argue that the United States Supreme Court disposition of the appeal to that Court from the state court action determines some or all of the issues raised in the present action.

Conclusions

Starting with the contentions about the effect of the United States Supreme Court ruling, there is no basis for construing that ruling as dispositive of any of the issues in the present action.

As to the res judicata point, the record sufficiently establishes that both the Funds and the Commission acquiesced in having the ERISA issue reserved for the federal court action. It should be said that there was no particular reason to do this. The state courts, which analyzed the nature and background of the Compact with great thoroughness, were competent to decide the ERISA issue. However, the parties were not barred from reserving the ERISA point for the federal court, and they did so. Thus the doctrine of res judicata does not apply.

This brings us to the main issue of the case—whether the procedure under the Compact to assess plaintiff Funds for Commission expenses is barred by ERISA. The ini-

tial question—and the one which is dispositive—is whether the Compact should be viewed as constituting federal law for the sake of applying § 514(d) of ERISA, 29 U.S.C. § 1144(d), which provides that nothing in ERISA shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States.

Article I, § 10 of the federal Constitution provides that no state may enter into "any Agreement or Compact" with another state without the consent of Congress. As already noted the Waterfront Commission Compact was ratified by Congress.

Congressionally ratified interstate compacts have been treated at times as state law, and at times as federal law, depending on the issue involved. For the sake of applying the language in 42 U.S.C. § 1983 "under color of state law," it has been held that a Congressionally approved compact constitutes state law. *Lake Country Estates* v. *Tahoe Reg. Planning Agcy.*, 440 U.S. 391, 399 (1979). However, when questions have arisen regarding whether the interpretation of a compact by a state court is final, as being one of state law, it has been held that the compact is federal law subject to final interpretation by the United States Supreme Court. *Cuyler* v. *Adams*, 449 U.S. 433, 438 (1981); *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959). Indeed, the *Cuyler* case contains the following broad statement:

> "Because congressional consent transforms an interstate compact within this Clause into a law of the United States, we have held that the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question." 449 U.S. at 438.

Certain cases have held that an interstate compact is federal law taking precedence over inconsistent state law.

Delaware River Joint Toll Bridge Comm'n v. *Colburn*, 310 U.S. 419 (1940); *Bush* v. *Muncy*, 659 F.2d 402, 410 (4th Cir. 1981), *cert. denied*, 455 U.S. 910 (1982); *Washington Metropolitan Area Transit Auth.* v. *One Parcel of Land in Montgomery County, Maryland*, 490 F. Supp. 1328 (D. Md. 1980).

A case dealing with the Waterfront Commission Compact is *DeVeau* v. *Braisted*, 363 U.S. 144 (1960). The Court held that state legislation implementing the Compact was not superceded by certain federal statutes. Although Congress did not literally ratify the implementing legislation, as it ratified the Compact itself, Congress expressly gave its consent to the creation of the implementing legislation. 363 U.S. at 154. While the Court did not in express words state that the Waterfront Commission Compact and its implementing legislation constituted federal law, the Court reviewed the background of the Compact and the extensive consideration given in Congress prior to the ratification of the Compact. The Court noted that "Congress unambiguously supported" the Compact as "at the core" of reforming the serious problems of crime, corruption and racketeering in the port of New York. 363 U.S. at 153. Thus, the Court concluded that "it would offend reason to attribute to Congress a purpose to preempt" the implementing legislation by virtue of the federal statutes cited as being in conflict with such legislation. 363 U.S. 154-55.

The basic reasoning of *DeVeau* applies in the present case. The fact that Congress ratified the Waterfront Commission Compact, and indeed indicated its strong support of that Compact after extensive hearings, leads to the conclusion that the Compact, including the assessment procedure in § 9858, should be considered to be federal law, and that it is not preempted or superseded by ERISA.

For the foregoing reasons, the motion of plaintiff Funds for partial summary judgment is denied. The motion of

defendant Waterfront Commission is granted, and the action is dismissed.

So ordered.

Dated: New York, N.Y.
July 20, 1983

/s/ THOMAS P. GRIESA
THOMAS P. GRIESA
U.S.D.J.

APPENDIX C

Relevant Constitutional and Statutory Provisions

CONSTITUTION OF THE UNITED STATES OF AMERICA

Article I, Section 10, Clause 3.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

* * * * *

EMPLOYEE RETIREMENT INCOME SECURITY ACT ("ERISA")

ERISA § 403(c) (codified in 29 U.S.C. § 1103(c))

§ 1103

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d) of this section, or under section 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

ERISA § 574(a) (codified in 29 U.S.C. § 1144(a))

(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit

plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

ERISA § 574(d) (codified in 29 U.S.C. § 1144(d))

(d) Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

* * * * *

WATERFRONT AND AIRPORT COMMISSION ACT

New York Laws of 1953, c. 882 § 1 (pt.), Art. XIII par. 3. (codified in N.Y. Unconsol. Laws § 9858)

§ 9858. Assessment of expenses upon employers; reserves

After taking into account such funds as may be available to it from reserves, federal grants or otherwise, the balance of the commission's budgeted expenses shall be assessed upon employers of persons registered or licensed under this compact.[1] Each such employer shall pay to the commission an assessment computed upon the gross payroll payments made by such employer to longshoremen, pier superintendents, hiring agents and port watchmen for work or labor performed within the port of New York district, at a rate, not in excess of two per cent, computed by the commission in the following manner: the commission shall annually estimate the gross payroll payments to be made by employers subject to assessment and shall compute a rate thereon which will yield revenues sufficient to finance

[1] Sections 9801-9873.

the commission's budget for each year. Such budget may include a reasonable amount for a reserve but such amount shall not exceed ten per cent of the total of all other items of expenditure contained therein. Such reserve shall be used for the stabilization of annual assessments, the payment of operating deficits and for the repayment of advances made by the two states.

Office-Supreme Court, U.S.
FILED
AUG 8 1984
ALEXANDER L. STEVAS,
CLERK

No. 84-29

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Petitioners,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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No. 84-29

NYSA-ILA VACATION AND HOLIDAY FUND
and NYSA-ILA GAI FUND,

Petitioners,

against

THE WATERFRONT COMMISSION OF NEW YORK HARBOR,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

Statement

This is an action by petitioner Funds (the NYSA-ILA Vacation and Holiday Fund and NYSA-ILA GAI Fund) for a declaratory judgment that the payments by the Funds of vacation and holiday pay and guaranteed annual income payments (hereinafter collectively "payments") to longshoremen are not subject to assessment by the Waterfront Commission of New York Harbor, the respondent herein, pursuant to the assessment provisions of the Waterfront Commission Compact (N.Y. McK. Unconsol. Laws 9858; N.J.S.A. 32: 23-58) upon the ground that such assessments are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C., §1001, *et seq.* (1976).

In April 1978, certain employers of longshoremen in the Port of New York district instituted an action against the Waterfront Commission for a declaratory judgment that the payments by the Funds were not "gross payroll payments" paid by the "employers" of longshoremen for

"work or labor performed" within the meaning of the assessment provisions of the Waterfront Commission Compact and were therefore not subject to assessment by the Commission (pet., App. A, p. 5a). The employers' complaint against the Commission sought a judgment declaring that the Commission's assessments on the payments not only were unauthorized but also were unconstitutional upon the ground of federal preemption (p. 6a).

The Commission answered the complaint and counterclaimed against the New York Shipping Association ("NYSA") and the Funds for a declaratory judgment that the payments were assessable by the Commission and that the NYSA and Funds were "employers" liable to the Commission for the assessments (*Ibid.*).

In January 1979 (after the above proceedings in the state action), the Funds instituted this action in federal court (*Ibid.*). Paragraphs 22-25 of the complaint herein refer to the pendency of the state action and such proceedings therein.

At a pre-trial conference herein, it was agreed between the parties that this action should be placed upon the suspense calendar pending the outcome of the state action (*Ibid.*).

The state action was ultimately decided in the Commission's favor by the New York Court of Appeals. *American Sugar Refining Co. of New York v. Waterfront Commission*, 55 N.Y.2d 11, 447 N.Y.S.2d 685 (1982). The Court of Appeals held that the payments are assessable by the Commission and that the Funds (as well as the direct employers themselves) are "employers" liable to the Commission for the payment of such assessments. The Court of Appeals further held that the assessment provisions of the Compact were not preempted by the federal labor law or the Internal Revenue Code (447 N.Y.S.2d, at pp. 693-694). The Court of Appeals pointed out, in this connection, that the Waterfront Commission Compact had been approved by Congress and that therefore " 'even the

most subtle casuistry could not conjure up a claim of preemption' ", quoting from *DeVeau v. Braisted*, 363 U.S. 144, 153 (1960).

The Funds and NYSA then appealed to this Court upon the asserted federal constitutional grounds of due process and federal preemption. Their Jurisdictional Statement (Docket No. 81-2062) specifically argued that the Commission's assessment of the payments was preempted by ERISA (pp. 9-10, 13-15). The Commission moved to dismiss the appeal upon the grounds (1) that the Waterfront Commission Compact is not a state statute within the meaning of 28 U.S.C. §1257(2) pursuant to which the Funds and the NYSA were purportedly appealing (pp. 2-3 of Commissioner's Motion to Dismiss); (2) that the Funds and the NYSA never challenged in the state courts the constitutional validity of the assessment provisions of the Compact as applied (pp. 3-6) and (3) that the federal preemption and due process constitutional claims were, in any event, unsubstantial (*Ibid.*).

On June 28, 1982, this Court entered an Order providing: "The appeal is dismissed for want of a substantial federal question." (102 S. Ct. 3474). Thereafter, the Funds removed this case from the suspense calendar and cross-motions for summary judgment were made in the District Court, which granted summary judgment in favor of the Commission and dismissed the complaint (pet., App. B, 14a *et seq.*) and the Court of Appeals affirmed (pet., App. A., 1a *et seq.*).

Reasons for Denying the Writ

I.

Petitioner Funds' claim of federal preemption based upon ERISA is untenable in view of Congressional approval of the Compact after specific discussion of the assessment provisions of the Compact.

The Waterfront Commission Compact is an interstate compact between the states of New York and New Jersey duly approved by Congress (Act of August 12, 1953, 67

Stat. 54, c.407). See *DeVeau v. Braisted, supra,* 363 U.S., at pp. 147-151.

The conclusive answer to the Funds' claim of federal preemption is that Congress has consented to the Compact (including its provisions relating to assessments). For example, in sustaining the constitutionality of Section 8 of the Waterfront Commission Act, which prohibits the collection of dues for waterfront unions having criminals as officers or employees and which has the legal status of an independent state statute since it is not part of the Compact, this Court in *DeVeau v. Braisted, supra,* relied upon the fact that Congress was mindful that Section 8 is part of the Waterfront Commission Act (which includes the Compact as Part I). The Court concluded from this that Congress in approving the Compact had demonstrated its intent, even though Section 8 is not formally part of the Compact, that Section 8 should stand despite the provision of National Labor Relations Act granting employees the right to bargain collectively through representatives of their own choice. In *DeVeau,* this Court, as noted, said, "Had §8 been written into the Compact, even the most subtle casuistry could not conjure up a claim of preemption" (362 U.S., at p. 153).

See also *International Longshoremen's Association v. Waterfront Commission of New York Harbor,* 495 F. Supp. 1101, 1124 (S.D.N.Y. 1980), *aff'd in part and reversed in part,* 642 F.2d 666 (2d Cir. 1961), *cert denied,* 454 U.S. 966 (1981), wherein it was specifically held, among other things, that Section 8 of the Waterfront Commission Act is not preempted by ERISA.

Since the assessment provisions are part of the Compact itself, "even the most subtle casuistry could not conjure up a claim of preemption." Indeed, in the state case, the New York Court of Appeals in its opinion referred to specific Congressional discussion, during the consent process, of the assessment provisions of the Compact. *American Sugar Refining Co. of New York v. Waterfront Commission, supra,* 55 N.Y.2d, at pp. 691-692.

It cannot reasonably be contended that ERISA repeals the Act of Congress consenting to the Compact. On the contrary, ERISA specifically provides that nothing therein "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States" (29 U.S.C., §1144(d)).

A long line of decisions by this Court establishes that Congressional approval of an interstate compact transforms it into federal law. E.g., *Cuyler v. Adams*, 449 U.S. 433, 438, n. 7 (1981); *Delaware River Joint Toll Bridge Commission v. Colburn*, 310 U.S. 419 (1940); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 278 (1959) ("The construction of a compact sanctioned by Congress under art. I, §10, cl. 3, of the Constitution presents a federal question."). The Funds' argument to the contrary in this case is without substance.

II.

In dismissing petitioners' prior appeal for want of a substantial question, this Court held that the Funds' claim of preemption based upon ERISA is unsubstantial.

A.

As noted, on June 28, 1982, this Court dismissed the appeal of the Funds and the NYSA from the decision of the New York Court of Appeals in *American Sugar Refining Co. of New York v. Waterfront Commission, supra.* As also noted, the order of the Court provided: "The appeal is dismissed for want of a substantial federal question."

The Jurisdictional Statement of the Funds and the NYSA specifically argued that the Commission's assessments of the payments were preempted by ERISA, as follows:

> "Congress has seen the need for a national response. It has expressly encouraged the private

sector to resolve through collective bargaining the problems spawned by technology. [case citations] . . . It has shown particular solicitude for employee fringe benefit programs as the favored instrument of worker protection . . . Recently, Congress adopted ERISA, a comprehensive regime for the regulation of employee benefits. 29 U.S.C. §1001, *et seq.* (1976). In this pervasive statute, Congress made clear its intent to confine employee benefits exclusively to the federal domain 'superced[ing] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.' 29 U.S.C. §1144(a) (1976); see *Alessi v. Raybestos-Manhattan Inc.*, 451 U.S. 504 (1981)." [The *Alessi* case involved ERISA] [pp. 9-10; footnotes omitted].

* * *

"The Court of Appeals of New York excused its expansive reading of WCA §9858 by the expedient device of labeling the imposition of a licensing assessment or fee (App. A at 11a, 15a-16a). The court, however, failed to explain how this 'fee' could be levied upon employee benefit trust funds not required to be licensed under the WCA. It simply changed the statutory language, which explicitly limited the levy to employers, so as to permit the imposition upon the funds as 'payors of the benefits.' (App. A at 22a). In so doing, it disregarded the teachings of both Congress and this Court that employee benefit trust funds are entirely separate and distinct from the contributing employers. ERISA §§ 403(a), 403(c)(1) and 404(a), 29 U.S.C. §§ 1103(a), 1103(c)(1) and 1104(a) (1976); *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981)." [The *Amax Coal* case also involved ERISA] [pp. 14-15; footnotes omitted]

This Court thus ruled, in dismissing the appeal of the Funds and the NYSA, that the asserted constitutional

claims, including the claim of federal preemption based upon ERISA, were unsubstantial. That decision is, of course, controlling here. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) (votes of Justices to affirm summarily and to dismiss for want of a substantial federal question are votes on the merits and district court was not free to ignore dismissal of appeal by Supreme Court upon ground federal question was unsubstantial).

B.

The Funds make the convoluted argument that, in dismissing the appeal of the Funds and the NYSA from the decision of the New York State Court of Appeals in *American Sugar Refining Co. of New York v. Waterfront Commission, supra*, for want of a substantial federal question instead of upon the ground that the Waterfront Commission Compact is not a state statute within the meaning of 28 U.S.C. § 1257(2), this Court thereby held that the Compact is a state—not a federal—statute. This tortured argument is untenable.

The question whether the Compact is a state statute within the meaning of 28 U.S.C. § 1257(2) is completely independent of the question whether the Compact is a state or federal statute for the purpose of determining whether ERISA preempts the Compact. In other words, even upon the unreasonable assumption that this court, in dismissing the Funds' appeal, held that the Compact is a state statute within the meaning of 28 U.S.C. § 1257(2), it does not follow that the Compact is a state statute for the purpose of determining whether ERISA preempts the Compact. *Lake Country Estates Co., Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398-400 (1979) (conduct of regional planning agency constituted conduct "under color of state law" within the meaning of Civil Rights Acts of 1871 notwithstanding Congressional approval of interstate compact creating agency).

Moreover, the Funds' arguments respecting the meaning, in respect of 28 U.S.C. §1257(2), of this Court's dismissal

of the Funds' prior appeal is strained to the breaking point. This Court has heretofore held that construction of an interstate compact approved by Congress involves a "federal title, right, privilege or immunity" within the meaning of former Section 344 of Title 28 (now 28 U.S.C. §1257(3)) vesting this Court with jurisdiction to review state judgments by writ of certiorari. *Delaware River Joint Toll Bridge Comm'n v. Colburn, supra.* It follows from such decision by this Court respecting 28 U.S.C. 1257(3) that an interstate Compact approved by Congress is not a state statute within the meaning of 28 U.S.C. 1257(2).

As the Court of Appeals pointed out below (pet., App. A, p. 13a):

> "Although the Supreme Court's dismissal of the appeal 'for want of a substantial federal question' might, as the Funds argue, be construed as an assumption that the Compact is a state rather than a federal law, we believe that the Court really meant that the issue presented, regardless of the basis of its jurisdiction, was not sufficiently important to warrant review. In our view, the appellants read too much into the Court's failure to treat the appeal as improvidently taken and to convert it into a petition for a writ of certiorari before acting. Accepting the Funds' argument would require considerable speculation by this court to conclude that the Supreme Court intended *sub silentio* and by summary disposition to overrule a well-established rule most recently reaffirmed in *Cuyler* [namely, that Congressional consent operates to 'transform interstate compacts into federal law.' *Cuyler v. Adams*, 449 U.S. 433, 438, n. 7 (1981).] We find such a conclusion unjustified."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Dated: New York, New York
August 6, 1984

Respectfully submitted

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